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# SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 89

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SAMUEL A. MYERS ET AL

*v.*

INTERNATIONAL TRUST COMPANY

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## BRIEF FOR PETITIONERS SAMUEL A. MYERS and HARRY MYERS

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DUNBAR, NUTTER & McCLENNEN,
EDWARD F. McCLENNEN
*For the Petitioners.*

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*v.*

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## THE ERROR CLAIMED

The District Court of the United States for the District of Massachusetts and the Circuit Court of Appeals for the First Circuit, after trial of the issue between the parties to this case, decided that the defendant-petitioners had not made a false statement. The Superior Court of Massachusetts and the Supreme Judicial Court of that Commonwealth erroneously declined to give effect as *res adjudicata* to this decision.

The decision was reached in confirming an offer in composition in bankruptcy and in granting the consequent discharge in bankruptcy. The petitioners' claim is based not on the discharge in bankruptcy, as such, but on the decision that the statement was not false; a decision which was made after active trial of the issue between the parties and necessary to the judgment confirming the composition and granting the discharge.

## STATEMENT OF FACTS

On March 27, 1916, the defendant-petitioners for certiorari, Samuel A. Myers and Harry Myers, as co-partners under the name of S. A. & H. Myers, of Boston, in response to a letter from the plaintiff-respondent International Trust Company, sent a statement of their financial condition on January 1, 1916, prepared by the petitioners' bookkeeper and in accordance with the petitioners' books. Subsequently, the respondent made loans to the petitioners. In January, 1917, an involuntary petition in bankruptcy was filed against the petitioners. They made an offer of 40% in composition. A majority of the creditors accepted the offer. It was referred to the Referee in Bankruptcy. He recommended its confirmation. There-

upon, on March 23, 1917, the petitioners filed an application for confirmation of the composition. The respondent International Trust Company by its counsel, John R. Lazenby, now counsel in the case at bar, entered an appearance in opposition to confirmation and assigned as a specification of objection that the petitioners had obtained loans from the respondent "by the statement made in writing to the International Trust Company, that on the first day of January, 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting to $59,713.12; that the alleged bankrupts did not include in said item of notes payable a note of $3,000 secured by a mortgage of certain real estate, and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit." "Said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000 (the exact sum being unknown to your petitioners) had been assigned and set over to the Commercial Investment Trust, and further, that the accounts receivable as set forth in said statement do not amount to the said sum of $58,425.06." (R., pp. 51, 54.)

These objections were referred to the Referee. He heard the petitioners and the respondent International Trust Company. He found and reported that the petitioners had made the financial statement of March 27, 1916, and that the International Trust Company relied on it in making the loans, but that when the financial statement was made it was a **true statement** and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time and kept

by an experienced, competent bookkeeper, and that "I do not find any evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Trust. I therefore find and so report, that according to the method of bookkeeping employed by the alleged bankrupts, the amount of the accounts receivable, January 1, 1916, was correctly set forth in said statement. I therefore find, and so report, that this objection is not sustained." (R., p. 58.) The Referee reported the testimony, and this testimony was substantially the same testimony which was introduced subsequently at the trial, in the Superior Court, of the case now at bar.

The case was heard in the Bankruptcy Court by the District Judge after the return of the report of the Referee. The District Judge confirmed (245 Fed. 110; R., p. 60) the finding of the Referee, that the petitioners did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit, and decided that it was not the duty of the defendants to state the fact of the assignment, but that the creditor, if it considered the point material, ought to have inquired about it, and that the statement ought not to be extended by implication to include recitals which it did not contain and which were never made by the alleged bankrupts, the petitioners. Accordingly, on May 28, 1917, the District Court confirmed the composition.

The International Trust Company appealed to the Circuit Court of Appeals for the First Circuit. That court accepted the reasoning and conclusions of the District Judge and on August 25, 1917, affirmed the order confirming the composition (245 Fed. 110, 112.) A judgment was entered accordingly, with a mandate to

the District Court. This judgment was "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge." (R., pp. 41, 42.)

On November 6, 1917, the International Trust Company brought the suit at bar against the petitioners to recover the unpaid balance (R., p. 27) and sought to avoid the discharge on the ground that the liability to the International Trust Company was for obtaining money by false pretenses or false representations made in writing by the petitioners to the respondent. The petitioners duly pleaded, and offered the bankruptcy record in evidence. It was excluded, but was made by reference a part of the bill of exceptions subsequently allowed. (R., pp. 20, 48 to 97.)

The petitioners in offering the record contended that the effect of it as an estoppel was to be determined by the laws of the United States. (R., p. 21.) At the close of the evidence the petitioners requested the court to instruct the jury that:

> "10. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not false."
>
> "11. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not made with an intention to deceive."
>
> "8. The mere failure to state that the accounts had been assigned as collateral security to the Com-

mercial Investment Trust would not make the statement false."

"12. The discharge of the defendants by the confirmation of the composition is a bar to this action." (R., p. 21).

These requests were refused, and the petitioners' exceptions were saved. (R., p. 26). The jury returned a verdict for the respondent International Trust Company for $14,304.49, March 2, 1921. (R., p. 6.) The Supreme Judicial Court overruled the petitioners' exceptions. (R., p. 48.)

The evidence at the trial in the Superior Court was like the evidence at the trial in the Bankruptcy Court and showed the following facts: The petitioners were a partnership engaged in the manufacture of clothing. They dealt with the plaintiff as a bank of deposit and also borrowed money from it. Prior to sending the statement of March 27, 1916, above referred to, the petitioners, in July, 1915, had entered into a contract with the Commercial Investment Trust under which this Trust agreed "to make advances to first party upon the assignment to it as collateral security therefor" of the petitioners' accounts receivable. In the financial statement of January 1, 1916, the item of accounts receivable was the amount of accounts receivable which the petitioners then actually had. No deduction was made from that amount for those accounts which had been assigned as collateral security under this contract with the Commercial Investment Trust. On the other hand, the accounts payable, as shown on the statement, included an amount equal to all accounts which had been so assigned for the advances which this Trust had made to the petitioners. Accordingly, the net capital was not overstated. The petition-

ers, under the arrangement with the Commercial Investment Trust, continued to hold and to collect these collateral accounts, remitting the proceeds to the lender in reduction of the loans. The petitioners did not have any conversations with the plaintiff's officers or say anything beyond what appeared in the financial statement itself. The petitioners testified that they had no intention to deceive the plaintiff, and that on receiving the request for a statement they turned it over to the bookkeeper and asked him to get out a statement and gave no directions to him, and that they believed that the statement as they signed it was true. Glass, the bookkeeper, called as a witness by the plaintiff, testified that he believed that the statement was true and that he had no intention to deceive. The contract with the Commercial Investment Trust contained provisions for the payment of interest at rates determined by the amount of accounts assigned during the course of a year. As the amount so assigned exceeded $100,000, the interest actually paid was one-thirtieth (1-30) of one per cent. (1%) a day on daily balances, — that is, 12 per cent. a year. This $100,000 was not composed of the amounts of assigned accounts receivable at any one time, but the total for a year, — that is, if they were 60-day accounts, $100,000 might be reached without the amount assigned at any time being more than $20,000. All loans made by the plaintiff to the petitioners during the six months following the receipt of the financial statement, were repaid. The first loan still remaining in part unpaid, was made October 2, 1916.

The plaintiff claims that the statement was false because it did not call attention to the contract with the Commercial Investment Trust and to the terms of the contract, and to the fact that some of the accounts receivable

were held by this Trust as collateral for advances. This claim of the plaintiff's, the petitioners contended and now contend had been conclusively determined against the plaintiff by the decision of the District Court of the United States and by the decision of the Circuit Court of Appeals. As appears from the bill of exceptions and from the opinion of the Massachusetts Court, the petitioners' present contention was duly made in the Superior Court, and in the Supreme Judicial Court, namely (1) that the estoppel by judgment of the United States Courts was to be determined by the laws of the United States, (2) that the exclusion of the records of the United States Courts was erroneous, (3) that the mere failure to state that the accounts had been assigned as collateral security would not make the statement false within the meaning of Section 17, Clause 2, of the Bankruptcy Act, (4) that **the finding of the United States Court established conclusively that the statement was not false, and that it was not made with an intention to deceive,** and (5) that the discharge was a bar.

## ARGUMENT

The petitioners respectfully submit that:

**FIRST.** The United States Courts had decided after a trial of the particular issue between the same parties in the Bankruptcy Court, that the petitioners' representations were not false or made with an intention to deceive.

**SECOND.** This decision created an estoppel in the petitioners' favor against the trial of that same issue in the case at bar.

**THIRD.** This conferred on the petitioners, rights and immunities under the constitution and statutes of the United States.

### FIRST

### THE UNITED STATES COURTS HAD DECIDED AFTER A TRIAL OF THE PARTICULAR ISSUE BETWEEN THE SAME PARTIES IN THE BANKRUPTCY COURT, THAT THE PETITIONERS' REPRESENTATIONS WERE NOT FALSE OR MADE WITH AN INTENTION TO DECEIVE.

The Bankruptcy Act (U. S. Compiled Stats., Secs. 9598, 9601) provides that:

> "Sec. 14 (*b*) The judge shall hear the application for a discharge . . . . and discharge the applicant, unless he has . . . . (3) obtained money or property on credit, upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person . . . . "
>
> "Sec. 14 (*c*) The confirmation of a composition shall discharge the bankrupt from all his debts other than those agreed to be paid by the terms of the

composition and those not affected by a discharge."

"Sec. 17 (2) A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . . (2) are liabilities for obtaining property by false pretenses or false representations . . . ."

The respondent projected the issue of falsity or not, before the United States Court. When the petitioners with the consent of a majority of their creditors applied for a discharge by confirmation of composition, the respondent, in order to protect its rights if the statement was false, needed not to object. The discharge would not release the petitioners from the respondent's claim if it arose from false representations (Sec. 17). If the respondent had not objected, the discharge would have been granted in course, without any trial of the issue of falsity. But the respondent did object and thereby required the United States Courts to try that issue; for not only is falsity excepted from a discharge but it is also a bar to a discharge, if the statement was in writing and made directly to the lender (Sec. 14). Unquestionably and admittedly, the statement was in writing and was made directly to the respondent. The only question was falsity, — an issue common both to an application for a discharge and to its effect on the particular claim, when granted.

This falsity is as the word is used in the Bankruptcy Act and is the same in the two sections.

At the respondent's behest, the United States Court heard that issue and all the evidence which the respondent offered in support of its contention. The Court then decided that the petitioners had obtained money on credit on a statement made in writing by them to the respondent but that the statement was not false or made with an intention to deceive.

## SECOND

## THIS DECISION CREATED AN ESTOPPEL IN THE PETITIONERS' FAVOR AGAINST THE TRIAL OF THAT SAME ISSUE IN THE CASE AT BAR.

There is no reason why the respondent should have a second opportunity to try the same issue. If the respondent had prevailed on it in the United States Court, the petitioners would have been denied their discharge (Sec. 14 (*b*)). Thus the petitioners had only one chance to get a bar to the respondent's claim. There is no reason why the respondent should have two chances to prevent that bar.

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based." (*Bluthenthal* v. *Jones*, 208 U. S. 64, 66.)

Equally, an adjudication granting a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the granting was based.

When the respondent offered the objection, the parties to the trial of it were the respondent and the petitioners.

"The general principle, applied in numerous decisions of this Court, and definitely accepted in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48-49, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for

the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): 'This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.' " (*Oklahoma* v. *Texas*, 256 U. S. 70, 85.)

This principle of *res adjudicata* or estoppel by judgment is one of the most firmly established.

*United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 459.

*Troxell* v. *D. L. & W. R. R.*, 227 U. S. 434, 440.

*Radford* v. *Myers*, 231 U. S. 725.

*Bates* v. *Bodie*, 245 U. S. 520.

*Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464.

*Merriam* v. *Whittemore*, 5 Gray 316, 317.

*Burlen* v. *Shannon*, 99 Mass. 200.

*Foye* v. *Patch*, 132 Mass. 105, 110.

*Edwards* v. *Columbia Amusement Co.*, 215 Mass. 125.

The test of its applicability between the same parties is not identity of cause of action, or of relief sought, but identity of issue tried so that the same evidence would support the finding.

*United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 459.

*In Re Samuels*, 263 Fed. 561 (C. C. A. 2nd).

Manifestly that identity exists here. "False" as used in Section 17, Clause 2, of the Bankruptcy Act, excepting from the discharge, liabilities for obtaining property by false pretenses or by false representations, — means intentionally, morally wrong and not simply untrue.

*Collier on Bankruptcy*, 11th edition, pp. 432, 433.
*Remington on Bankruptcy*, 2d edition, Sec. 2747.
*Brandenburg on Bankruptcy*, 4th edition, Sec. 1559.
*Loveland on Bankruptcy*, 4th edition, Sec. 760.

The same was true of the word "fraud" as long as that remained in the act before the amendment of 1903 struck out the requirement of a judgment before bankruptcy.

*Bullis* v. *O'Beirne*, 195, U. S. 606, 619.
*Tindle* v. *Birkett*, 205 U. S. 183.
*Crawford* v. *Burke*, 195 U. S. 176.
*Forsyth* v. *Vehmeyer*, 177 U. S. 177.
*Hennequin* v. *Clews*, 111 U. S. 676.
*Neal* v. *Clark*, 95 U. S. 704.
*Re Blumberg*, 94 Fed. 476, 479.

The same is true of the word "false" as used in Section 14 (b), defining the grounds for refusing a discharge.

*International Trust Co.* v. *Myers*, 245 Fed. 110 (C. C. A. 1st).
*Doyle* v. *First National Bank*, 231 Fed. 649, 653.
*Franklin* v. *Monning Dry Goods Co.*, 217 Fed. 929 (C. C. A. 5th).
*Peck* v. *Lowenbein*, 178 Fed. 178 (C. C. A. 4th).
*Gilpin* v. *Merchants National Bank*, 165 Fed. 607 (C. C. A. 3d).

Both the respondent and the Massachusetts Court seem to assume that the petitioners contend that the granting

of the discharge *ipso facto* created the estoppel. It is not so. If the respondent had not succeeded in having the issue of falsity tried in the United States Court there would have been no finding upon it to pass into the judgment granting the discharge and no estoppel would exist.

*Friend* v. *Talcott*, 228 U. S. 27.

In *Friend* v. *Talcott*, the creditor attempted to prevent the discharge by showing that the bankrupt had made a false statement to the creditor or his representative. The only statement which the director could show was not to him or to his representative. Therefore, as there was no statement which met the requirements of Sec. 14 (b), it became unnecessary to consider whether the statement which had been made to a credit reporting concern was false; and the discharge was granted without considering falsity. Subsequently the creditor sued on the claim and sought to avoid the bar of the discharge, by showing that the statement was false and that he had given credit in reliance on it. Section 17 does not require that the statement be made to the creditor or his representative. Therefore, the statement which even if false would not prevent a discharge, would avoid the bar of the discharge, if false. So, for the first time falsity came up for trial and there was no *res adjudicata* or estoppel to prevent. Chief Justice White, in so holding, said that there was no "identity of cause between the two cases" and "It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as *nothing in the assertion of the right to be exempt from*

*the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition.* On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition." (p. 41.) (Italics not in original.)

In *Friend* v. *Talcott*, the issue of falsity had not been tried before. In the case at bar, it had. To paraphrase the language just quoted, the assertion of the right to be exempt from the operation of the discharge here relied upon involves traverse or denial of a relevant fact (i.e., non-falsity) established as a result of the approval of the composition. As to identity of cause, the two cases are opposites.

If the decision of the State Court stands, there is the unseemly result that after active trial of the same issue between the same parties on the same evidence, two unreviewable decisions stand, — the first that the statement was not false, and the second that it was false.

The decision of the United States Court involving falsity as used in a United States Statute is at least of equal dignity and persuasiveness with that of a State Court. Whether right or wrong, it was conclusive in the petitioners' favor.

## THIRD

## THIS CONFERRED ON THE PETITIONERS, RIGHTS AND IMMUNITIES UNDER THE CONSTITUTION AND STATUTES OF THE UNITED STATES.

(1) The petitioners have the judgment of a United States Court that their statement was not false. They

have the Federal right to have due effect given to that judgment as settling that issue. Of a similar question of estoppel by judgment of a United States Court, this Court in *Radford* v. *Myers*, 231 U. S. 725, 730, said:

> "Whether such effect was given as the former judgment required, presents a Federal question for determination. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary, to elucidate the matters decided, the opinion of the court which rendered the judgment. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, supra, 234, and previous cases in this court therein cited."

Accordingly, in *Radford* v. *Myers* this Court did not dismiss the Writ of Error, but on the contrary considered the merits of the question and affirmed the judgment of the State Court on its merits.

In *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141, this Court held that the effect, of a decree of the Circuit Court of the United States granting a preliminary injunction to the Crescent Company, as probable cause for the injunction suit (notwithstanding the fact that the suit was held finally to be without merit), was a question arising under the Constitution and Laws of the United States (p. 146), and that the State Court in the subsequent suit at bar by the Butchers' Company against the Crescent Company for malicious prosecution in bringing the suit in the Circuit Court to obtain the injunction, had, by failing to give it that effect, deprived the Crescent Company of a privilege or immunity under the Constitution or Laws of the United States (pp. 146, 156, 158).

This establishes that the incidental effect as well as the direct effect of a decision of a Court of the United States presents a Federal question, and that the right of the prevailing party in that decision is a right or immunity under the Constitution and Statutes of the United States.

(2) The petitioners have the Federal right inherent in a discharge in bankruptcy. In *Crawford* v. *Burke*, 195 U. S. 176, 186, 194, this Court decided that whether the Supreme Court of the State had given proper effect to a discharge in bankruptcy in view of the circumstances under which the debt had been contracted, was a Federal question, and reversed the judgment of the State Court and gave judgment that the discharge was a bar.

As the statement was not false, the petitioners' only claim was a provable claim.

*Schall* v. *Camors*, 250 Fed. 6; 251 U. S. 239, 251.
*Crawford* v. *Burke*, 195 U. S. 176, 187-193.
*Tindle* v. *Birkett*, 205 U. S. 183.
*Friend* v. *Talcott*, 228 U. S. 27, 38.
*Kreitlein* v. *Ferger*, 238 U. S. 21, 27.

The petitioners had a Federal right to have the discharge given effect as a bar to a provable claim which did not arise out of a false statement involving moral turpitude.

There was no evidence of falsity and none of moral turpitude. The conclusive judgment of the United States Court established the contrary.

Respectfully submitted,

EDWARD F. McCLENNEN,
*For the Petitioners.*

October 1, 1923.

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